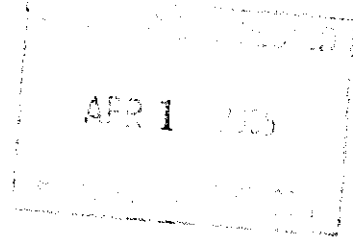


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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Federal-State Joint Board On)
Universal Service)
)
Smith Bagley, Inc.)
Petition for Waiver of Section 54.400(e) of)
the Commission's Rules)



WC Docket No. 03-109

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2005

Released: March 30, 2005

By the Commission:

I. INTRODUCTION

1. In this Order, we grant the petition of Smith Bagley, Inc. (SBI) seeking a waiver of section 54.400(e) of the Commission's Lifeline and Link-Up¹ eligibility rules to enable eligible residents of the Eastern Navajo Agency in the state of New Mexico to receive enhanced Lifeline and Link-Up support.² We find that this waiver is in the public interest and warranted by the unique and compelling circumstances of low-income consumers residing in the Eastern Navajo Agency.

II. BACKGROUND

A. The Commission's Lifeline and Link-Up Eligibility Rules

2. The Commission's Lifeline and Link-Up programs are designed to ensure that telephone service is affordable to low-income consumers by providing universal service funds to reduce the price consumers pay for basic telephone service and initial telephone installation.³ Under the Commission's

¹ The Lifeline and Link-Up program is a universal service support mechanism designed to ensure that quality telecommunications services are available to low-income consumers at just, reasonable, and affordable rates. See 47 U.S.C. § 254(b)(1). Generally, enhanced Lifeline and Link-Up support provides qualifying low-income consumers living on Tribal lands additional discounts off the monthly cost of telephone service and telephone installation. See 47 C.F.R. §§ 54.405(a)(4), 54.411(a)(3).

² See Letter from David LaFuria, Smith Bagley, Inc., to Marlene H. Dortch, Federal Communications Commission, dated November 15, 2004 (Waiver Petition). See also 47 C.F.R. § 54.400(e). In its original petition for waiver, filed March 19, 2004, SBI asked the Commission to waive its rules concerning "near reservation lands" so that residents of the Eastern Navajo Agency would be eligible to receive enhanced Lifeline and Link-Up support. See *Smith Bagley, Inc., Petition for Waiver of Section 54.400(e) of the Commission's Rules*, filed March 19, 2004 (Original Waiver Petition). On November 15, 2004, SBI amended its petition, offering a different basis for its waiver, which we discuss more fully below. See Waiver Petition.

³ See 47 U.S.C. § 254(b)(1) ("Quality services should be available at just, reasonable, and affordable rates.").

rules, there are four tiers of federal Lifeline support. All eligible telephone subscribers receive Tier 1 support, which provides a discount of up to \$6.50 off of the monthly cost of telephone service for a single telephone line in their principal residence.⁴ Tier 2 support provides an additional \$1.75 per month in federal support as long as all relevant state regulatory authorities approve such a reduction.⁵ Tier 3 support provides an amount equal to one-half of the subscriber's state or carrier-provided Lifeline support, up to a maximum of \$1.75.⁶ Finally, Tier 4 support provides eligible residents of Tribal lands, as defined in section 54.400(e) of the Commission's rules, enhanced Lifeline support.⁷ Under Tier 4, eligible residents of Tribal lands receive up to \$25.00 in additional discounts off the monthly cost of telephone service, provided that this amount does not bring the basic local residential rate below \$1 per month per qualifying low-income subscriber.⁸

3. The Link-Up program assists qualifying low-income consumers in initiating telephone service by paying a portion of the service connection charge.⁹ Specifically, the Link-Up program provides eligible telephone subscribers a discount of up to \$30.00 off the initial cost of installing telephone service.¹⁰ Eligible residents of Tribal lands receive up to \$70.00 more off the initial costs of installing telephone service.¹¹

4. Section 54.400(e) defines an eligible resident of Tribal lands as "a qualifying low-income consumer living on or near a reservation."¹² The term "reservation" means "any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act, and Indian allotments."¹³ The term "near reservation" is described as lands adjacent or contiguous to reservations and that generally

⁴ See 47 C.F.R. §§ 54.401(a)(2).

⁵ 47 C.F.R. § 54.403(a)(2).

⁶ 47 C.F.R. § 54.403(a)(3).

⁷ 47 C.F.R. § 54.403(a)(4).

⁸ *Id.*

⁹ See 47 C.F.R. § 54.411.

¹⁰ 47 C.F.R. § 54.411(a)(1).

¹¹ 47 C.F.R. § 54.411(a)(3).

¹² 47 C.F.R. § 54.400(e). For purposes of identifying the geographic areas within which enhanced Lifeline and Link-Up should apply, the Commission determined that the term "Tribal lands" should include the United States Department of Interior Bureau of Indian Affairs (BIA) definitions of "reservation" and "near reservation" contained in sections 20.1(v) and 20.1(r) of the BIA regulations, respectively. See *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (*Twelfth Report and Order*), citing 25 C.F.R. §§ 20.1(r) and 20.1(v). See also, *Federal-State Joint Board on Universal Service*, Twenty-Fifth Order on Reconsideration, Report and Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958 (2003) (*Twenty-Fifth Reconsideration Order*) (confirming that the Commission would continue to use the BIA definition adopted in the *Twelfth Report and Order*).

¹³ 25 C.F.R. § 20.1(v).

have been considered Tribal lands for purposes of other federal programs targeted to federally-recognized Indian tribes.¹⁴

5. On August 31, 2000, the Commission stayed implementation of enhanced Lifeline and Link-Up benefits to the extent that they apply to qualifying low-income consumers living near a reservation.¹⁵ The Commission concluded that the term "near reservation" as defined by BIA may include wide geographic areas that do not possess the characteristics that warrant the targeting of enhanced Lifeline and Link-Up support to reservations, such as geographic isolation, high rates of poverty, and low telephone subscribership.¹⁶ The Commission determined that giving low income support to such broad areas may not further the goal of increasing telecommunications deployment and subscribership in the most historically isolated and underserved regions of the Nation.¹⁷ The Commission currently has a pending rulemaking on how to identify geographic areas that are adjacent to reservations, consistent with the goal of targeting enhanced Lifeline and Link-Up to the most underserved areas of the nation.¹⁸

B. SBI's Petition for Waiver

6. The Eastern Navajo Agency is a geographic region throughout which the Navajo Nation tribal government administers tribal government programs. A significant portion of the Eastern Navajo Agency lies outside the borders of what qualifies under federal law as reservation land.¹⁹ SBI provides cellular telephone service in portions of the Eastern Navajo Agency.²⁰ On December 7, 2004, the New Mexico Regulatory Commission released a final order designating SBI as an eligible telecommunications carrier (ETC)²¹ in portions of San Juan, McKinley and Sandoval Counties, all of which are within the Eastern Navajo Agency.²² Currently, ETCs are not permitted to extend enhanced Lifeline and Link-Up

¹⁴ 25 C.F.R. § 20.1(r). *See also*, *Twelfth Report and Order*, 15 FCC Rcd at 12218-19.

¹⁵ *Twelfth Report and Order*; *stayed in part, Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17112 (2000) (*Tribal Stay Order*).

¹⁶ *Id.* at 17113.

¹⁷ *Id.* at 17114.

¹⁸ *See Twenty-Fifth Reconsideration Order*, 18 FCC Rcd at 10974-75.

¹⁹ *See* Original Waiver Petition at 2. *See also* Letter from David LaFuria, Smith Bagley, Inc., to Marlene H. Dortch, Federal Communications Commission, Exhibit A, Navajo Land Department Map of Navajo Nation, August 12, 2003.

²⁰ *See* Original Waiver Petition at 2.

²¹ Pursuant to section 254(e) of the Communications Act of 1934, as amended (the Act), only eligible telecommunications carriers designated under section 214(e) of the Act are eligible to receive Lifeline and Link-Up support. *See* 47 U.S.C. § 254(e); 47 U.S.C. § 214(e).

²² *See In the Matter of the Application of Smith Bagley, Inc. for Extension of its Designation as an Eligible Telecommunications Carrier in the State of New Mexico*, Final Order, Case No. 04-00289-UT, issued December 7, 2004.

support to all residents in the Eastern Navajo Agency because the entire area does not meet the definition of reservation under section 54.400(e) of the Commission's rules.²³

7. In its petition, SBI asks the Commission to waive section 54.400(e) and declare that enhanced Lifeline and Link-Up support is available to qualifying consumers in the Eastern Navajo Agency.²⁴ Absent such a waiver, portions of the Eastern Navajo Agency would not be eligible for such support because those areas do not fall within the definition of a reservation. SBI states that strict application of section 54.400(e) frustrates the public interest and the Commission's goal of increasing telephone penetration to unserved and underserved areas.²⁵ SBI further states that a waiver would promote public health and safety and advance the public interest by increasing telephone penetration among American Indians, whom the Commission has identified repeatedly as being unserved and underserved by telecommunications facilities.²⁶

III. DISCUSSION

8. We grant SBI's request for waiver of section 54.400(e) of the Commission's rules and find that SBI has demonstrated good cause to justify the waiver by demonstrating that special circumstances exist and because granting such a waiver, in this instance, is in the public interest.

9. Generally, the Commission's rules may be waived for good cause shown.²⁷ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁹ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.³⁰

10. We find that SBI has identified special circumstances in the Eastern Navajo Agency that warrant a waiver of section 54.400(e) of the Commission's rules. In the *Twelfth Report and Order*, the Commission identified a number of factors that are primary impediments to subscribership on Tribal lands, including the lack of access to and/or affordability of telecommunications services, the cost of

²³ See 47 C.F.R. § 54.400(e). The Eastern Navajo Agency is owned by individual Navajos, the federal government, the state of New Mexico, and private landowners, but is not a federally recognized reservation land. See Original Waiver Petition at 2.

²⁴ See Waiver Petition at 2. Originally, SBI filed a petition requesting the Commission to designate the Eastern Navajo Agency as near reservation land so that its residents could be eligible to receive enhanced Lifeline and Link-Up support. SBI amended its filing, seeking a waiver of section 54.400(e) of the Commission's rules. It is this amended filing that we address herein.

²⁵ *Id.* at 2-3.

²⁶ *Id.* at 3.

²⁷ 47 C.F.R. § 1.3.

²⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972).

²⁹ *WAIT Radio*, 418 F.2d at 1157.

³⁰ *Northeast Cellular*, 897 F.2d at 1166.

basic service, the cost of intrastate toll service, inadequate telecommunications infrastructure and the cost of line extensions, and the lack of competitive service providers offering alternative technologies.³¹ To address these impediments, the Commission adopted measures specifically targeted to increase subscribership and infrastructure development on Tribal lands, where unaffordable service and low subscribership are most prevalent.³² Our review of the record reveals that the Eastern Navajo Agency has the same impediments to subscribership and infrastructure development as those existing on Tribal lands.

11. As noted above, the Eastern Navajo Agency encompasses lands that do not fall within the Commission definition of a "reservation" for purposes of enhanced Lifeline and Link-Up support. Ninety-two percent of the 37,404 persons living within its borders are Navajo Nation tribal members.³³ Recent data published by the Census Bureau indicate that telephone penetration rates and per capita incomes in the Eastern Navajo Agency are far below the average existing throughout America. The telephone subscribership penetration rates for the United States is approximately 94% and per capita income is \$21,587.³⁴ Telephone penetration rates and per capita income in the Eastern Navajo Agency are far below the average existing on Tribal lands nationwide. Census data show that the average telephone penetration rate on Tribal lands is approximately 68% and per capita income is \$12,452.³⁵ By comparison, telephone penetration in the Eastern Navajo Agency is approximately 33% and per capita income is \$6,979.³⁶ Census data also show that nearly 45% of the 37,404 Eastern Navajo Agency residents subsist at or below the federal poverty level, compared to 23.5% of American Indian residents living on Tribal lands.³⁷ In addition, data show that unemployment in the Eastern Navajo Agency stands at 25%, compared to 13.6% of American Indian residents on Tribal lands.³⁸ Finally, approximately 52% of households rely on wood for heat and 46% of households lack plumbing.³⁹ It is evident, therefore, that

³¹ See *Twelfth Report and Order*, 15 FCC Rcd at 12220.

³² *Id.* at 12228-12251.

³³ Waiver Petition at 2. See also 2000 Census of Population: Total Population, P1, Summary File 3 (2000).

³⁴ See "Telephone Subscribership in the United States," Industry Analysis and Technology Div., Wireline Competitive Bur. Federal Communications Commission (rel. August 2004), available at <http://www.fcc.gov/wcb/iatd/lec.html>. See also 2000 Census of Population: Per Capita Income in 1999 (Dollars), Total Population, P82, Summary File 3 (2000).

³⁵ See "Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands," Industry Analysis and Technology Div., Wireline Competition Bur., Federal Communications Commission (rel. May 2003), available at <http://www.fcc.gov/wcb/stats>. See also 2000 Census of Population: Income and Poverty in 1999, American Indian and Alaska Native Area and Alaska Native Regional Corporation, GCT-P14, Summary File 4 (2000).

³⁶ See Waiver Petition at 2; Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Marlene H. Dortch, Federal Communications Commission, dated January 28, 2005. See also 2000 Census of Population: Per Capita Income in 1999 (Dollars), Total Population, P82, Summary File 3 (2000).

³⁷ See 2000 Census of Population: Poverty Status in 1999 by Age (17), Universe, P87, Summary File 3 (2000).

³⁸ Waiver Petition at 2. See also 2000 Census of Population: Sex by Employment Status for Population 16 years and Over, Universe, P43, Summary File 3 (2000).

³⁹ Original Waiver Petition at 5. See also 2000 Census of Population: House Heating Fuel, Universe, Occupied Housing Units, H40, Summary File 3 (2000); 2000 Census of Population: Plumbing Facilities, Universe, Housing Units, H47, Summary File 3 (2000).

depressed economic conditions exist in the Eastern Navajo Agency. The Commission has previously determined that this is one of the primary causes of low subscribership levels.⁴⁰

12. Other factors identified by the Commission as impediments to subscribership also exist in the Eastern Navajo Agency. In particular, the cost of basic telephone service, \$13.50 per month, and the cost of intrastate toll service, \$0.16 per minute, is high relative to the incomes of many families in the Eastern Navajo Agency.⁴¹ Moreover, sparse population and distances between existing plant and requesting customers in this area make extending wireline telephone facilities challenging, if not infeasible. In addition, depressed economic conditions of potential subscribers may not justify construction of telecommunications facilities because of the consumers' inability to pay for service. In fact, there are many areas within the Eastern Navajo Agency where no telephone service is available.⁴² SBI submits that it has been unable to identify another area in the United States of similar geographic size or population that suffers from these types of conditions.⁴³

13. Based on the statistics discussed above and our review of the record, we conclude that specific action is needed to address the impediments to subscribership and infrastructure development in the Eastern Navajo Agency to ensure affordable access to telecommunications services for residents. Although the enhanced Lifeline and Link-Up program is limited to low-income consumers living on reservations, most of the factors that the Commission found relevant in establishing enhanced Lifeline and Link-Up support exist for the Eastern Navajo Agency. We therefore conclude that it is appropriate to waive section 54.400(e) of the Commission's rules and permit ETCs serving the Eastern Navajo Agency to offer Tier 4 Lifeline and Link-Up benefits to qualified residents.

14. We find that granting SBI's Waiver Petition will serve the public interest by allowing SBI to provide service at rates that will likely increase the number of subscribers in the Eastern Navajo Agency who can afford basic telephone service. As illustrated in SBI's Waiver Petition, household telephone penetration in the other four Navajo Nation Agencies significantly increased as a result of ETCs having the ability to offer and advertise Tier 4 benefits.⁴⁴ In fact, in three years, SBI added more than 27,000 new Tier 4-eligible subscribers in four other Navajo Nation Agencies.⁴⁵ Based on the performance of the other four Navajo Agencies, SBI estimates that 20,000 households in the Eastern Navajo Agency will be able to initiate telephone service with the availability of Tier 4 support.⁴⁶ This record persuades us that making enhanced Lifeline and Link-Up support available will eliminate or diminish the effect of unaffordability for individuals in the Eastern Navajo Agency who have never had telephone service and for individuals who cannot afford to maintain telephone service. Furthermore,

⁴⁰ See *Twelfth Report and Order*, 15 FCC Rcd at 12220.

⁴¹ See, e.g., Qwest Corporation Transmittal No. 2003-027, filed August 15, 2003.

⁴² Original Waiver Petition at 5.

⁴³ Original Waiver Petition at 5.

⁴⁴ Original Waiver Petition at 6. The Navajo Nation is comprised of five Navajo Agencies: Tuba City, Chinle, Fort Defiance, Shiprock, and Eastern Navajo. *Id.* at 2.

⁴⁵ Original Waiver Petition at 6.

⁴⁶ See Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Marlene H. Dortch, Federal Communications Commission, dated October 30, 2003 at Attachment, entitled "Smith Bagley, Inc., Near Reservation Lands, Presentation to FCC".

making access to telecommunications services more affordable also serves the public interest because it enables these low-income consumers to have easier access to emergency, medical, government and other public services that they may need.

15. The availability of enhanced federal support in the Eastern Navajo Agency will also make this area more attractive for carrier investment and deployment of telecommunications infrastructure. As the Commission stated in the *Twelfth Report and Order*, increasing the total number of individuals who are connected to the network within a tribal community enhances the value of the network in that community and results in greater incentives for ETCs to serve those areas.⁴⁷ Specifically, as the number of potential subscribers grows, carriers may achieve greater economies of scale and scope when deploying facilities and providing service to those areas. In this way, granting this waiver serves the public interest because doing so furthers the Commission's goal of increasing the deployment of telecommunications facilities in unserved and underserved regions of the Nation, especially among Native American populations. We emphasize that the action we take here does not affect state sovereignty or impinge upon a state's ability to establish universal service programs aimed at increasing telephone subscribership within its borders.

16. Verizon opposes a waiver of section 54.400(e) until such time as the Commission determines how the term "near reservation" should be defined.⁴⁸ As noted above, however, Smith Bagley no longer requests the Commission to designate the Eastern Navajo Agency as "near reservation" land. Because we do not grant this waiver on the basis of defining "near reservation," we reject Verizon's argument.

17. Further, we are not persuaded by Verizon's argument that SBI's Waiver Petition should be denied because states are in a better position to address pockets of low subscribership in non-reservation areas within their respective state.⁴⁹ We agree that, in most instances, it is more appropriate for states to implement Lifeline and Link-Up programs designed for the specific needs of their state. Nothing in this order is intended to prevent state action in this regard. Indeed, the state of New Mexico is free to adopt measures to eradicate pockets of low subscribership within its borders. We emphasize that, at the present time, 67% of occupied housing units in the Eastern Navajo Agency do not have telephone service.⁵⁰ As we stated in the *Twelfth Report and Order*, "the unavailability or unaffordability of telecommunications service on Tribal lands is at odds with our statutory goal of ensuring access to such services to "[c]onsumers in all regions of the Nation, including low-income consumers."⁵¹ Although the Eastern Navajo Agency is not entirely comprised of Tribal lands under the Commission's definition, the area is almost exclusively populated by Native Americans that suffer from the same conditions present on other federally-recognized Tribal lands.⁵² The availability of Tier 4 support program will provide immediate and vital benefits to low-income consumers in the Eastern Navajo Agency, consistent with the

⁴⁷ *Twelfth Report and Order*, 15 FCC Rcd at 12224.

⁴⁸ See Opposition of Verizon to Smith Bagley's Request for a Waiver of "Near Reservation" Definition, filed April 29, 2004 (Verizon Opposition).

⁴⁹ Verizon Opposition at 3-4.

⁵⁰ See Waiver Petition at 2. See also Letter from David A. LaFuria, Counsel for Smith Bagley, Inc., to Marlene H. Dortch, Federal Communications Commission, dated January 28, 2005.

⁵¹ *Twelfth Report and Order*, 15 FCC Rcd at 12221.

⁵² See *supra*, para. 11.

Commission's goal of enhancing telecommunications access among consumers on Tribal lands and its responsibility to ensure a standard of livability for members of Indian tribes.

IV. ORDERING CLAUSE

18. ACCORDINGLY, IT IS ORDERED that, pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 254, and the authority under sections 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Waiver Petition filed by Smith Bagley, Inc., on November 15, 2004, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary